

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIRTRU CORPORATION,
Plaintiff,
v.
MICROSOFT CORPORATION
Defendant.

CASE NO. 2:23-cv-872
ORDER

This matter comes before the Court on Defendant Microsoft Corporation’s motion to revisit claim construction. Dkt. No. 141. Having reviewed Microsoft’s motion, Plaintiff Virtru Corporation’s response, and the relevant record, the Court DENIES Microsoft’s motion without prejudice.

1. BACKGROUND

Virtru sued Microsoft in the U.S. District Court for the Western District of Texas, alleging that Microsoft’s Office365 and Azure products infringe on its three patents: Patent Numbers 8,589,673 (“673 Patent”), 8,874,902 (“902 Patent”), and 9,578,021 (“021 Patent”), (collectively, “Asserted Patents”). Dkt. No. 1. Microsoft moved to transfer the case from Texas to the Western District of Washington, but

1 the then-presiding judge, U.S. District Judge Alan Albright, denied its motion on
 2 January 18, 2023. Dkt. No. 79.

3 Days later, on January 22, 2023, Judge Albright issued a claim construction
 4 order interpreting seven claim terms. Dkt. No. 85. He found that the proper
 5 construction for six of the terms is their “plain and ordinary meaning.” *Id.* at 45-47.
 6 For the term “automatically,” Judge Albright distinguished between “automatically
 7 requesting” and “automatically selecting.” *Id.* at 46. Judge Albright construed
 8 “automatically selecting” as having its “plain-and-ordinary meaning, except once
 9 initiated, there is no human required input when identifying which identity
 10 provider to use,” but Judge Albright held the underlined phrase should be concealed
 11 from a jury. *Id.* at 27 (underlining in original). The final construction for
 12 “automatically requesting” is plain-and-ordinary meaning. *Id.*

13 In March 2023, Microsoft petitioned the Federal Circuit for a writ of
 14 mandamus ordering transfer to this District. *In re: Microsoft Corp.*, No. 23-128 (Fed.
 15 Cir. 2023). The Federal Circuit issued the writ on June 7, 2023, and Judge Albright
 16 transferred the case on June 9, 2023. Dkt. Nos. 95, 96.

17 The parties moved for a case scheduling order but disagreed about whether
 18 the Court should “revisit” claim construction, i.e., set a new claim construction
 19 hearing and related deadlines. Dkt. No. 131 at 3-5. At a hearing on January 4, 2024,
 20 the Court ordered briefing on the claim construction issue. Dkt. No. 133.

21 Microsoft argues this Court should revisit Judge Albright’s claim construction
 22 order, as recent developments have highlighted further disputes between the
 23 parties and the need for further clarification about claim terms. Microsoft’s

1 argument is threefold: First, Judge Albright's construction of "automatically" is
 2 erroneous because part of the "automatically selecting" construction will be
 3 concealed from the jury, and because it is ambiguous and it differs from the
 4 "automatically requesting" construction; second, revisiting claim construction is
 5 warranted because the parties continue to dispute the plain and ordinary meaning
 6 of the other terms; third, the Patent Trial and Appeal Board's (PTAB) order denying
 7 inter partes review "constitute[s] intrinsic evidence that clarifies the meaning of the
 8 asserted claims, and should be considered in requiring the Asserted Patents'
 9 method steps to be performed in a certain order." Dkt. No. 141 at 14-15.

10 **2. DISCUSSION**

11 "District courts may engage in a rolling claim construction, in which the court
 12 revisits and alters its interpretation of the claim terms as its understanding of the
 13 technology evolves." *Jack Guttman, Inc. v. Kopykake Enter., Inc.*, 302 F.3d 1352,
 14 1361 (Fed. Cir. 2002). Indeed, "a district court may (and sometimes must) revisit,
 15 alter, or supplement its claim constructions . . . to the extent necessary to ensure
 16 that final constructions serve their purpose of genuinely clarifying the scope of
 17 claims for the finder of fact." *In re Papst Licensing Digital Camera Pat. Litig.*, 778
 18 F.3d 1255, 1261 (Fed. Cir. 2015). To this end, district courts have been known to
 19 revisit claim construction sua sponte. *NXP USA, Inc. v. Impinj, Inc.*, No. 2:20-CV-
 20 01503-JHC, 2023 WL 2372916, at *4 (W.D. Wash. Mar. 6, 2023) (citing *Level Sleep*
 21 *LLC v. Sleep No. Corp.*, No. 2020-1718, 2021 WL 2934816, at *3 (Fed. Cir. July 13,
 22 2021)).

1 Requiring a motion to reconsider under LCR 7(h) before revisiting claim
2 construction, as Virtru advocates, goes against these principles. Virtru provides no
3 controlling or persuasive legal authority supporting such a limitation on the “rolling
4 claim construction” process endorsed by the Federal Circuit, and the Court will not
5 observe any such limitation now. *See MasterObjects, Inc. v. Meta Platforms, Inc.*,
6 No. 2023-1097, 2024 WL 630330, at *7 (Fed. Cir. Feb. 15, 2024) (declining to decide
7 whether the California district court should have revisited the issue of claim
8 construction after the case was transferred without a motion for reconsideration,
9 because it reversed the court’s constructions on the merits).

10 Whether this Court *should* revisit claim construction, however, is a different
11 inquiry. The Court considers below each of Microsoft’s arguments why revisiting
12 claim construction is warranted now.

13 First, Microsoft argues Judge Albright’s construction of “automatically
14 selecting” (i.e., “plain-and-ordinary meaning except once initiated, there is no
15 human required input when identifying which identity provider to use”) is
16 erroneous because the underlined phrasing is not to be shared with the jury. Dkt.
17 No. 141 at 11 (underlining in original). In his order, Judge Albright held that
18 presenting the underlined phrase to the jury would “likely lead to jury confusion,
19 given that it may appear to be redundant with the plain-and-ordinary meaning and
20 given that it is a negative limitation.” Dkt. No. 85 at 27. Partially concealing a
21 construction from the jury, Microsoft argues, results in error. Dkt. No. 141 at 11
22 (citing *Cal. Inst. of Tech. v. Broadcom Ltd.*, 25 F.4th 976, 989 (Fed. Cir. 2022) (“[I]t
23 is the duty of trial courts in patent cases in which claim construction rulings on

1 disputed claim terms are made . . . to inform jurors both of the court’s claim
2 construction rulings on all disputed claim terms and of the jury’s obligation to adopt
3 and apply the court’s determined meanings[.]”). Virtru does not contest Microsoft’s
4 argument about so-called “secret” constructions, but it raises “no objection to Judge
5 Albright’s full construction . . . being read to the jury.” Dkt. No. 143 at 12.

6 The Court finds that this issue does not mandate a full re-do of the claim
7 construction process as Microsoft requests. The Court will determine what
8 instructions will be read to the jury as trial nears, at which time the parties may
9 argue about and brief whether Judge Albright’s construction should be read in
10 whole or in part.

11 Microsoft also argues that Judge Albright’s order “compound[s] the
12 confusion” by issuing different constructions for the terms “automatically selecting”
13 and “automatically requesting.” Dkt. No. 141 at 12. But the parties argued this
14 point before Judge Albright, and Microsoft fails to provide new information—that is,
15 information unavailable to the Texas court—that would cause this Court to reach a
16 different conclusion. Before the Texas court, Microsoft argued the prosecution
17 history of the ’673 Patent and later-filed ’021 Patent supported construing
18 “automatically” as “exclud[ing] a human-mediated process for the limitations where
19 it is found.” Dkt. No. 85 at 21. In response, Virtru argued “automatically” did not
20 require construction as it does not absolutely bar human involvement. *Id.* at 22. For
21 the “automatically selecting” limitation, Judge Albright found Virtru had
22 disclaimed human input in identifying which identity provider to use. *Id.* at 25. For
23 the “automatically requesting” limitation, Judge Albright held Virtue had not

1 disclaimed human input. *Id.* at 27. Microsoft argues Judge Albright's construction
2 goes against the presumption that the same terms appearing in different portions of
3 the claims should be given the same meaning, but it provides no reason for this
4 Court to revisit its previously rejected arguments when nothing has changed
5 besides the venue of the case. *See Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d
6 1197, 1207 (Fed. Cir. 2010) ("Defendants attempted to resurrect a claim
7 construction that the district court already rejected, without offering a new
8 definition. Restating a previously settled argument does not create an 'actual
9 dispute regarding the proper scope of the claims[.]'"). Moreover, the presumption
10 applies "unless it is clear from the specification and prosecution history that the
11 terms have different meanings at different portions of the claims." *Fin Control
12 Systems Pty, Ltd. v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed. Cir. 2001). Judge
13 Albright's distinction between "automatically selecting" and "automatically
14 requesting" stems from the prosecution history. Microsoft has not provided a
15 convincing argument as to why this Court should reach a different conclusion.

16 Second, Microsoft asks the Court to construe the six terms disputed before
17 Judge Albright because he declined to do so. Dkt. No. 141 at 12-13. But this
18 characterization is inaccurate. Judge Albright afforded the six other terms their
19 "plain-and-ordinary meaning." *See* Dkt. No. 85 at 45-47.

20 Next, Microsoft argues that Virtru has added new evidence and theories of
21 infringement under the doctrine of equivalents that were not timely presented to
22 the Texas court. Dkt. No. 141 at 14. Microsoft argues that "if the Court is going to
23 allow Virtru to keep . . . [these new theories] in the case, then all pertinent

1 constructions should be revisited.” *Id.* Microsoft also attaches as an exhibit Virtru’s
2 disclosure of asserted claims and infringement contentions that Virtru served
3 Microsoft on July 28, 2023. Dkt. No. 141-1. Microsoft does not expand upon this
4 argument further or provide authority in support of its claim. In reviewing their
5 joint status report, it appears that the parties dispute the nature of these July 28,
6 2023, disclosures—Microsoft says they are amended infringement contentions in
7 violation of Local Patent Rule 124 while Virtru says it merely supplemented its
8 infringement contentions to comply with Local Patent Rule 121. Dkt. No. 124 at 8.
9 Because this issue is not squarely before the Court and the record is incomplete, the
10 Court is not persuaded that a complete do-over of claim construction is the cure for
11 such an alleged violation, a violation that Virtru denies.¹

12 Finally, Microsoft argues that additional constructions are necessary given
13 recent factual developments; specifically, PTAB denied institution of inter partes
14 review, but it stated that the steps in the method claims of the Asserted Patents
15 must be performed in a certain order. Dkt. No. 141 at 14. Microsoft contends that
16 PTAB’s statements constitute intrinsic evidence that clarifies the meaning of the
17 claims, which this Court should consider in revisiting claim construction. *Id.* at 14-
18 15.

19 PTAB’s statements were made in the context of Microsoft’s challenges to
20 patentability. Indeed, both parties specifically disavowed the need for claim
21

22 ¹ The Court does not comment on the propriety of Virtru’s July 28, 2023, disclosures.
23 To the extent Microsoft believes them to be improper, it may seek relief from the
Court.

construction, so PTAB “construe[d] no terms.” Dkt. No. 144-10 at 3. And as Virtru notes, Microsoft is cagey to a fault about how PTAB’s statements undercut Judge Albright’s constructions, if at all, and how they affect the Court’s interpretation of the words of the claims themselves. *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 457 F.3d 1293, 1301 (Fed. Cir. 2006) (“[C]laim construction must begin with the words of the claims themselves.”).

Besides PTAB’s statements, Microsoft points to nothing in the claim language nor the specification that requires steps in a particular order. On this record, it is too speculative a leap for the Court to conclude that PTAB’s statements standing alone—especially given the context in which they were made—warrant revisiting claim construction and further delaying these proceedings.

3. CONCLUSION

Accordingly, the Court DENIES Microsoft's motion, Dkt. No. 141, without prejudice.

Dated this 31st day of May, 2024.

Jamal W
Jamal N. Whitehead
United States District Judge